# UNIT 1 GENERAL OVERVIEW OF INTELLECTUAL PROPERTY

**Structure**


1.1 Introduction
Objectives
1.2 The Concept of Intellectual Property
1.3 Different Categories of IP Instruments
1.4 Rationale behind Intellectual Property
1.5 Rights of the Owner of the IP, Other Individuals and the Society – Striking a Balance
1.6 Enforcement of IPRs
1.7 IP and the Constitution of India
1.8 Summary
1.9 Terminal Questions
1.10 Answers and Hints


## 1.1 INTRODUCTION

We encounter intellectual property at every step of our lives today. The design on the bed sheet and the pillow covers, the bed and other items of furniture in the house, the cereals for break fast, the pasteurised milk in tetrapack, the soft drinks and their bottles, the television, the personal computer, the gas stove, the microwave, the refrigerator, the vehicles, the weighing machine, the books, the films, the music cassettes, the tiles, the paints, and practically everything we use is the product of human ingenuity, knowledge and skill, besides labour and capital and falls under some kind of intellectual property that had to be respected before the item could be lawfully manufactured.

**Objectives**

After studying this unit, you should be able to:

- appreciate the concept of intellectual property vis-à-vis physical property;
- learn the different categories of intellectual property;
- appreciate the rationale behind IP, and the underlying premises;
- understand how a balance is sought to be achieved between the rights of the owner of IP on the one hand and the rights of other individuals and the society in general on the other; and
- know the position of IP under the Constitution of India.

## 1.2 THE CONCEPT OF INTELLECTUAL PROPERTY

The concept of intellectual property (IP) will be understood better if we understand what is meant by the term property. To a lay person property means some material object belonging to a particular person. The concept of ownership is critical to the concept of property. Ownership means the right to possess, use and dispose of the property and exclude the others. If a society does not recognise ownership, it will have no concept of property. In the legal sense, property refers to the bundle of rights that the law confers on a person by virtue of the ownership and possession of an object.

However, a material object under one's possession may not amount to much as property if it does not become a resource to satisfy some human want or need. Man by

exertion of his intellect, either in the form of ideas or technology, converts a natural resource into something of utility, making it an item of property.

Two factors significantly influence the value of an object as property. The first is scarcity, which refers to its availability in relation to the need. The scarcer is a thing in relation to the demand for it, the higher is its value. The second important factor influencing the value of an object is the knowledge of its use or uses. The higher the value of an object, the more zealously is it guarded as a 'property'.

What rights constitute the bundle of rights that are termed as property? These rights deal with various aspects of the relationship between persons and their property, such as: ownership and possession; use and enjoyment of the fruits of its application; exclusion of others from use and application of the property; and transfer of rights in the property.

The property can relate to a tangible thing e.g. land or buildings, or to an intangible thing e.g. a copyright. In the former case they are referred to as tangible or corporeal property, in the latter case they are known as intangible or incorporeal property.

Tangible property has a big advantage over intangible property: the fact of possession of a physical object by the owner ensures that any other person is excluded from using it. It is not so with the creations of the mind, say, an invention or a book which can be reproduced otherwise.

This brings us to the concept of intellectual property. It is simply the property created by the application of human mind. It is non-physical (intangible) and it derives its value from idea(s).

There is no uniform definition of IP. The domain of IP is expanding fast as knowledge and information become key drivers of techno-economic growth and of societal progress in general.

IP is a dynamic area; as science & technology make rapid advances, and as competition for markets becomes ever more fierce, human ingenuity is throwing up ever new ideas and newer products. Newer areas are emerging with claims for recognition as IP. They have to be accommodated as IP either in one of the existing categories or in new categories that have to be created. Thus while copyright originally was concerned with works of literature and artistic works gradually its scope expanded to cover works of drama, music, photography, cinematography, audio-visual recordings, performances, broadcasts and now computer programmes.

Among the successful new categories to be recognised as entitled to the status of IP are: 'Geographical Indications' which combine in themselves appellations of origin and indication of source and accord special treatment to wines and spirits; lay out design (topography) of integrated circuits, which has been recognised as an independent form of IP under the Agreement on Trade Related Aspects of the Intellectual Property Rights (TRIPS Agreement) of the World Trade Organisation (WTO). Genetic resources, and traditional knowledge and folklore have made strong claims for protection as IP. Galloping advances in the realm of internet and convergence may be the harbinger of new forms of IP.

**SAQ 1**

Indicate if the following statements are true (T) or False (F):

a) The concept of property is indissolubly linked with the concept of ownership.
b) Exclusion of others from enjoying the fruits of application and use of IP is a principal objective of IPR.

## 1.3 DIFFERENT CATEGORIES OF IP INSTRUMENTS

IP has been generally divided into two main branches viz., (a) Industrial Property, and (b) Copyright.

Industrial property consists of rights relating to inventions, trade marks, industrial designs and geographical indications.

Copyright protects rights related to creation of human mind in the fields of literature, scientific, music, art and audio-visual works, etc. Related rights protect performances of performing artists, phonograms and broadcasts. Related rights and neighbouring rights are terms used interchangeably.

The TRIPS Agreement of the WTO recognises seven categories of intellectual property rights (IPRs), which had already been enshrined in various treaties administered by the World Intellectual Property Organization (WIPO) since the late 19th century:

i) Copyright and Related Rights
ii) Trade marks, Trade names and Service marks
iii) Geographical Indications
iv) Industrial Designs
v) Patents
vi) Layout Designs of Integrated Circuits
vii) Undisclosed Information

Copyright is granted in respect of original literary, musical, artistic or audio-visual works – the creations of authors, playwrights, composers, artists, film makers. The rights under copyright include: rights of reproduction, communication to the public, adaptation and translation of work. Copyright is now spoken together with the *related* or *neighbouring rights* as one category. Though originality in expression is a requirement for copyright, the quality of the works is not an issue at all. It is to be noted that though the copyright subsists in works which are the creation of ideas, it is not the idea that the copyright protects, but merely the expression of the idea as fixed in a particular form. If an author thinks up the plot of a story, it is not the idea of the plot that is entitled for protection under a copyright but only the written form of the story flowing from the idea. Any other person can come up with a differently written story on the same idea and have a valid claim for a copyright over it. If a painter has a copyright in a painting which depicts sunrise no one else can legally copy that painting without his / her permission. However, there is no copyright in the idea of sunrise and anybody is free to paint sunrise as per his / her own imagination, and everyone will be entitled to copyright in one's own creation. The copyright is in the painting, not in the idea of sunrise. Copyright is an inherent right that commences since the completion of the work as an expression of the idea. Copyright comes with the doctrine of 'fair use', which includes use of the work for purposes of criticism, comment, news reporting, teaching and education, scholarship and research. Fair use does not constitute infringement. We may also remember that unlike patents or registered designs, copyright confers no monopoly rights. In fact if two persons can produce precisely similar work demonstrably working independently of each other, each one will have the legal right to his / her own creation. It should be reiterated that registration is not required for a work to be protected. A copyright work is protected from its creation.

Trade marks and service marks are distinctive symbols, signs, logos that help the consumer to distinguish between competing goods or services and are a major part of the goodwill a company enjoys in the trade. A trade name is the name of an enterprise, which also individualises the enterprise in the minds of the customers. They are

therefore protected as IP. Thus a trade mark is a sign that individualises the goods of a given enterprise and distinguishes them from the goods of its competitors. You may be quite familiar with the distinctive marks of Pepsi-Cola and Coca-Cola Companies. Similarly in passenger cars a characteristic star in front, or a characteristic treelike T, enclosed in an ellipse and displayed in the front and the rear of a vehicle immediately proclaims that the first vehicle is from the Mercedes and the second one is from the Tatas stable. Trade marks invariably come to symbolise quality of goods or services in the customer's mind. However, there is no requirement in law that trade mark has to meet any quality standards. If quality is not maintained, customers will shift to another brand. A trade mark is required to be distinctive and not deceptive. If you market goods of fake leather under the trade mark 'Realeather' you will be taken in by a deceptive trademark.

A geographical indication (GI) is a sign used on goods that have a specific geographical origin and possess qualities or a reputation that are due solely to the place of origin e.g. its specific climate, soil or method of production. Such goods enjoy an advantage over competing goods solely because of their geographical origin, which thus becomes a kind of IP and is protected. A GI is different from a trade mark. A trade mark is a sign that distinguishes the product and services of an enterprise from those of another. The owner of a trade mark is entitled to exclude others from using the trade mark. A GI merely tells that a product is produced in a certain place and has certain characteristics which are due to the place of production like specific soil, or climate or method of production. It can be used by all producers who make their products in a place designated by the GI and share the same qualities. Some best known examples of GI are: Champagne (special kind of sparkling wine originating in the French region of that name; Kolhapuri chappals from Kolhapur, India). The Paris Convention for the Protection of Industrial Property uses two terms in the context of geographical indication: appellation of origin and indication of source. Indication of source on a product merely indicates that the product originates in the place indicated. Appellation of origin indicates not only the place of origin but also the essential quality link between the product and the area of its origin. Protection of GI can be done in many ways: through a sui generis legislation or through decrees, or through registration or through reliance on tort of 'passing off' (which basically says that unfair trade practices should not be used). GI can also be protected by collective marks belonging to a group of traders or producers or a certification trade mark that does not belong to any one; the understanding for its registration is that anyone who meets the specified conditions can use it.

An industrial design is the ornamental or aesthetic aspect of an article; it may consist of three dimensional features such as shape or surface, or of two-dimensional features such as patterns, lines or colour. The design serves as a tool for product differentiation and lures customers by enhanced visual appeal. Industrial designs are applied to a wide variety of products of industry or handicraft: from watches, jewellery, fashion and other luxury items to industrial and medical implements; from houseware, furniture, electrical appliances to vehicles and architectural structures; from practical goods and textile designs to leisure items such as toys.

An industrial design is distinguished from trade mark primarily because it is constituted by the appearance of a product, which is not necessarily distinctive, whereas a trade mark is necessarily to be distinctive to serve as a sign for product differentiation. The functions of, and the justification for protecting industrial designs and trade marks are quite different. Designs must relate to the appearance of the object which is not determined by technical or functional necessity. Designs enhance the visual appeal and add to the commercial value of the product; they also facilitate the marketing and commercialisation of the product. For registration a design needs to be new and original, though the notion of these qualities may vary from country to country. In certain conditions, an industrial design can be protected under copyright law or the law against unfair competition.

A patent is a statutory right granted for a limited period to an inventor in respect of an invention to exclude any other person from manufacturing, using or selling the patented product or from using the patented process, without due permission. Under the TRIPS Agreement of the WTO, inventions in all fields of technology, whether products or processes are patentable if they meet the three criteria of novelty, involving an inventive step and being capable of industrial application. Patents are one of the oldest forms of IP protection.

Layout design (topography) of integrated circuits is a relatively new area in IP which has appeared with computer technology and has acquired importance as the technology makes rapid advances. The programming instructions on a computer chip are implemented through a circuitry printed on semiconductor layers. The design of circuitry on the chip requires great investment of knowledge, skills and capital and this needs to be protected as IP. The right in topography aims to prevent copying of the layout design but reverse engineering to come up with improved design is regarded as fair. It may also be noted that while for claiming a patent an invention is required to meet the criteria both of novelty and inventive step, a layout design is only required to be original. Protection of layout design confers no monopoly right; independent development of a design, identical with a protected design is permitted.

Undisclosed information gets recognition as a kind of IP that needs to be protected under the TRIPS Agreement. Earlier to it, the WIPO treaty (1967) and the Paris Convention recognised unfair competition as a part of IP. Unfair competition includes all acts contrary to honest practices in industrial or commercial matters; undisclosed information restricts honest practices to protection of trade secrets. The TRIPs Agreement (Article 40) does refer to the control of Anti-Competitive Practices in Contractual Licences; the Agreement also empowers member-States to make in their national legislation suitable provisions to prevent abuse of IPRs.

The intellectual property thus vests in a creation of human mind involving knowledge, labour and skill. It is the result of sustained intellectual application and efforts of inventors, authors and other creative persons, including first adapters and is a powerful factor of production and wealth generation in a modern economy. The IP is a significant factor in gaining competitive advantage over rivals in the trade and industry as the entire idea of IP is to protect the owner against its unlawful use by any person or party offering same or similar products or services.

IPRs, as their exercise has evolved in practice, can secure for the owner a broad range of advantages depending on the national law; for example, IPRs can effectively block imports or exports of relevant goods, or they can be used to divide markets, or restrict movement of goods produced by an enterprise from one territory to another. To fully comprehend the consequences of a national legislation in matters of IPR, it is important to grasp the purpose the law seeks to serve by creating these private rights in property. The chain of production to distribution of goods involves the following major steps: manufacture; first sale by the manufacturer; subsequent sales; exports/imports; use, other dealings. It is for the state to decide in which steps it should intervene to grant exclusive rights to the owner to ensure just reward for creative activity and best techno-economic returns for the State and the society.

A point to appreciate here is that IP is concerned with the human capacity to produce something new and offer it for public use. The property does not lie in the thing so produced and offered but in the owner's rights over the creation of his/her intellect. This intellectual property is intangible, and though in each case it is associated with a tangible object, it is independent of the object itself. Again, what IP protects is the use or value of ideas and not the abstract ideas themselves; there are no rights, hence no property, over the ideas per se.

**SAQ 2**

The three main categories of IP are:

a) patent, trade mark, copyright
b) trade mark, industrial design, geographical indication
c) computer programmes, layout designs of integrated circuit, rights of broad casting
d) patents, industrial design, undisclosed information

Tick the right answer.

*Spend 2 min.*

**SAQ 3**

Does the inventor of a new product get the IP rights over the product? If not, what do the rights pertain to?

## 1.4 RATIONALE BEHIND INTELLECTUAL PROPERTY

Just as one goes back to the concept of 'property' to appreciate better the meaning of intellectual property, one may look to the justifications advanced for protection of tangible property to appreciate the justification for IP. Within the capitalist system such justification comes from two angles: the labour justification and the personality justification.

The labour justification was propounded by Locke who viewed the labour of an individual as belonging to the individual and when one takes from the State what Nature has provided to it – some 'goods' akin to 'commons' – and mixes one's labour with it, one creates property for one self. Labour adds value to the goods and converts 'commons' into property. The creation of social value both by converting commons into goods and adding more value to goods by investment of labour deserves to be rewarded to encourage people to be innovative as also to perform better.

In moving from the tangible property to the intellectual property, both the views – rewarding innovation as well as rewarding value creation – have relevance. The society has to encourage people to strive to be innovative and come up with creative solutions to generate wealth and welfare as also to add value to existing goods and services.

Locke's idea of occurrence of commons in abundance in the primitive stage is apt in the consideration of intellectual property because ideas are always around us in abundance; this is the public domain. The IPRs do not appropriate the 'public domain' – the 'commons' are no body's private property. The IP law takes care of it by ensuring that no protection is given to either the everyday ideas, or highly extraordinary ideas like advances in mathematics. The IP law takes care that nobody unduly appropriates 'public domain' by ensuring that the rights are available only for a limited period after which the intellectual creation comes to the public domain.

Here we draw attention to a rather subtle parallel between the fields of tangible property and the intangible intellectual property. In the field of tangible property the rights of slaves as generators of property were not recognised. Even now the labour of housewife fetches no remuneration, and remains unrecognised as generator of wealth. Similarly, in the realm of IP the traditional knowledge and folklore, is yet to gain solid recognition as IP, and enjoys no commensurate protection as the creation of knowledge, skills and ideas, developed and perfected by local communities over centuries. This only confirms the view that property laws, whether for the tangible property or the intellectual property reflect power relations in society.

The justification for IP from the 'personality' angle regards property as a mechanism of expression of one's persona. Hegel is the main proponent of this view: property is

the embodiment of personality. Thus property is a very personal and private thing and needs to be protected. In the case of the intellectual property, however, this justification may apply in varying degrees to subject matters of different categories of IP. While products of art, music and literature and trade marks may reflect the personality of their creator to a remarkable degree, the inventions or engineering designs may not really support the personality thesis.

A major recognition for the personality justification of property is seen in the moral rights under the copyright law. These are deemed to be the inalienable rights of the author to safeguard the integrity of the work against any change that would damage the author's reputation or the message of the work.

Clearly a completely satisfactory rationale for intellectual property protection is not available either from the labour angle or the personality angle. Different categories of IP would appear to derive different degrees of justification from different angles. Patents and industrial designs would be better supported from the labour point of view; copyrights and trade marks would find better justification from the personality angle. The entire domain of the IP, however, is served better when both the views are taken together as justification for the protection of property.

**Underlying Premises**

From the foregoing discussions, it is seen that the IPRs are based on three underlying premises:

1. Creative activity culminating in IP can be increased by measures aimed to encourage it. Also, it will not be generated in economically adequate quantity for public use without economic incentives.

2. Grant of legal monopoly powers, even if for a limited period is the only way to ensure adequate economic benefits as just reward for the creation of IP.

3. The provisions of the global IP regime ensure just economic returns to the creation of IP while safeguarding the interest of other entrepreneurs and the society in general.

## 1.5 RIGHTS OF THE OWNER OF THE IP, OTHER INDIVIDUALS AND THE SOCIETY – STRIKING A BALANCE

It will be well to remember here that whatever be the justification for the protection of intellectual property, there can be no absolute rights in IP because all individual rights are subject to the recognition of, and respect for, the rights of other individuals and the rights of the society. It is the role of the State and the purpose of the law to harmonise conflicting claims and achieve a balance. Besides, the State, through the instrumentality of law, strives to reach definite goals in keeping with the aspirations of the society. The property rights are therefore generally tempered with considerations of distributive justice. Protection of individual property is important but it is equally important in a democratic polity that the State create conditions and necessary structures for people to have wide-spread access to opportunities. It is this balancing responsibility of the State which is reflected in the Indian Law: while private property is strongly respected and legally protected, it is no more a fundamental right.

In a competitive world while creativity and continuous innovation is absolutely necessary to remain on the scene, it is also equally important to ensure that one's ideas, products and designs are not copied without authorisation. Similarly one must learn how to acquire lawfully another persons ideas, products and designs for further reproduction and use in one's own business.

Essentially IPRs are defined in the negative and meant to stop others from copying or counterfeiting of the protected application, or expression of an idea without due permission. In the case of patents even a person who arrives at the same invention independently of the owner of the right is prohibited to exploit it without a licence from the owner of the right. In other forms of the IP e.g. for copyright or trade mark, absolute monopoly of the owner of the right may be suitably diluted. However, it should be clear that the grant of IPRs is to be seen in the context of rights of others, which are not to be ignored, and the public interest which remains paramount. The Intellectual Property Rights also confer no privilege on the products of the person owning the right in trade.

In the field of intellectual property, the rights of the individual owner are sought to be balanced with the rights of others, including the wider public interest, by several means like limiting the period during which exclusive IPRs are available to a reasonable degree; making preservation of life, environment, peace, morality as paramount conditions in granting IPRs – if the IPR would have an adverse impact on any of these, it is not granted; providing for compulsory licensing, or even revocation of patent, under certain circumstances e.g. if the owner abuses the right simply to block others with the result that the benefits of the IP do not flow to the public at reasonable cost, etc.

✍ *Spend 3 min.*

**SAQ 4**

How does the IP law seek to strike a balance between the rights of the IP owner, and the rights of other individuals and the society?

## 1.6 ENFORCEMENT OF IPRs

While most contracts lay down clearly and in detail the rights and obligations of contracting parties, any disputes that arise in connection with the contract can be resolved on the basis of provisions in the contract itself. What is different with IPR is the fact that it is aimed at excluding others from doing certain things as regards the IP even without the existence of a formal contract between them and the owner of the right. The effectiveness of IPRs is clearly dependent on how speedily they can be enforced with reasonable cost.

As requirement of space for storage of information and means and cost of copying tumble down with the advance of information and communication technologies, the scale and incidence of copying/reproduction have greatly increased. Piracy and counterfeiting are the scourge of the world trade. In books, films, music, computer programmes, pharmaceuticals and consumer goods, infringement of IPR on commercial scale is rampant.

While national laws provide legal remedies for violations of IPRs, the TRIPS Agreement lays down the provisions which must be included in the national IP laws and regulations of all member countries of the WTO to enable effective enforcement of IPRs. The remedies are meant to deter incidence of future infringement without harming legitimate trade, while safeguarding against the abuse of IPRs.

The TRIPS Agreement prescribes a number of requirements for a due process in IP law like fair and equitable procedures, not being unduly complicated or costly and not entailing unreasonable time limits or unwarranted delays, right to be heard and give evidence, right to written decision, judicial review, etc. including indemnification of defendant against abuse of enforcement procedures. The remedies that the Courts may grant can be both injunctive and compensatory relief. The defendant may be asked to deliver up the infringing material for destruction as a requirement of justice.

## 1.7 IP AND THE CONSTITUTION OF INDIA

The Constitution of India makes no specific mention of intellectual property. Property in the Constitution generally means tangible property. However, IP as a form of property can be put under Article 300A which deals with property and be entitled to a legal right.

Experts have spotted possibilities of a conflict between the IP, specially the copyright, and the constitutionally guaranteed freedom of speech and expression. The Courts have zealously upheld this fundamental freedom. In a case of any restriction on speech and expression, the perspective of the rights of viewers and listeners, is likely to get precedence over the perspective of the rights of broadcasters. Any rights (monopolies) that undermine the right to freedom of speech and expression may face a challenge.

## 1.8 SUMMARY

- The concept of intellectual property follows the concept of physical property which is inalienably linked to the concept of ownership of an article and means the right to possess, use and dispose of the article (property).
- Intellectual property is the creation of human intellect and is intangible (incorporeal) whereas the physical property is tangible (corporeal).
- Property means a bundle of rights in relation to the object owned. They concern ownership and possession; use and enjoyment of the fruits of application of the property; and the exclusion of others from such use and enjoyment, and the transfer of rights in the property.
- The TRIPS Agreement under the WTO recognises seven categories of IP viz. (i) copyright and related rights, (ii) trademarks and service marks, (iii) geographical indication (iv) industrial designs, (v) patents, (vi) layout designs of integrated circuits, (vii) undisclosed information. However, the domain of IP is expanding and soon new claimants may arise due to rapid advances in science and technology.
- The rationale behind IP flows from the labour angle or the personality angle. The former sees labour as belonging to the individual who creates new goods by mixing his/her labour with the 'commons' or adds value to the goods with investment of labour. Either way he/she is to be encouraged and rewarded. The 'personality' view regards the creation of intellect as an expression of the creator's persona, and thus a very personal thing that needs to be regarded and protected as property. Neither of the two angles can satisfactorily serve as justification for all categories of IP. While inventions may have little that will qualify them as expression of the inventor's persona, a literary or artistic or musical composition is likely to bear the stamp of the author in a substantial measure. Thus the rationale for IP has to be sought both in the labour angle and the personality angle together, rather than in any of them singly.
- The State, and through it the global IP regime, seeks to strike a balance between the interests of the creator of the IP and the interests of the other entrepreneurs and the Society in general. The means that ensure this balance are: grant of monopoly/exclusive rights generally for a limited period, after which the intellectual creation comes into the public domain; provision for compulsory licensing and even revocation of licence under certain conditions in the case of patents, and making preservation of life, environment, peace, morality as of paramount consideration while granting IPRs.

- The, TRIPS Agreement of the WTO prescribes enforcement measures to be incorporated in national laws for ensuring effective, speedy and cheap remedies against violation of IPRs. The process is to be fair and equitable and conscious of time and cost. While ensuring justice, it should create no barriers for world trade nor should it lead to abuse of enforcement. The remedies can be injunctive and compensatory; the courts can also order infringing material to be delivered up for destruction, if necessary, to meet the ends of justice.
- The Constitution of India makes no specific mention of IP. However, there is nothing in the constitution that would bar treatment of IP under property clauses. A possible area of conflict may arise between copyright and the freedom of speech and expression, which is a right constitutionally guaranteed and zealously upheld by the judiciary.

## 1.9 TERMINAL QUESTIONS

*Spend* 15 *min.*

1. Discuss the evolutionary challenges being faced in the field of IP due to rapid advances in science and technology. How are these challenges being met?
2. How many categories of IPRs are recognised in the TRIPS Agreement? Briefly discuss each one of them.
3. Discuss the rationale behind the concept of intellectual property. What are the underlying premises of the global IP regime?
4. How does the present IP system strike a balance between the rights of an inventor and the rights of other individuals and the Society in general?

## 1.10 ANSWERS AND HINTS

**Self Assessment Questions**

1. a) T
   b) F; it is true only for a limited period not as a general, unqualified statement.
2. a)
3. No; the Intellectual Property Rights do not cover the product as such but whatever the creator's intellectual contribution is to make it a reality.
4. By several devices designed to ensure that the owner's rights are not unqualified monopoly to continue indefinitely. Thus, no IP is recognised if its subject matter goes against the preservation of life & environment and peace & morality. The term of the IPR is limited to a reasonable period after which the intellectual creation comes to the public domain. There are statutory provisions for compulsory licensing in favour of a third party, and even for revocation of right, under certain conditions, which include availability of patented goods at a reasonably affordable price to the general public.

**Terminal Questions**

1. Refer 1.2
2. Refer 1.3
3. Refer 1.4
4. Refer 1.5

# UNIT 2 EMERGING ISSUES IN INTELLECTUAL PROPERTY

**Structure**


2.1 Introduction
Objectives
2.2 Advances in Information and Communication Technology – Challenges for IP in Digital Economy
Electronic Commerce
WIPO's Role
Internet Domain Names Disputes
2.3 Biotechnology and IP
Human Genome
2.4 Traditional Knowldege, Folk Lore, Biodiversity and IP
Biodiversity
2.5 Summary
2.6 Terminal Questions
2.7 Answers and Hints


## 2.1 INTRODUCTION

The global intellectual property system has constantly to cope with new challenges as on the one hand advances in science and technology give rise to ever new unprecedented issues and, on the other, new, legitimate claims crop up from commercialisation of knowledge embedded in traditional systems. The emergence of information and communication technology (ICT), and biotechnology (BT), the two fields of knowledge which have seen staggering advances at breath-taking pace, has posed new issues before the IP protection system. The progress in these two fields has literally transformed the way one had known the world, transacted business and carried out other activities even only a quarter century ago. Similarly as the conduct of R & D as mega business brought out predatory forays into commercialisation of knowledge embedded in traditional systems and exploitation of cultural heritage of indigenous communities without any share or acknowledgement going to the traditional communities that owned these resources, several issues of ethics and equity have come to the fore.

**Objectives**

After reading this Unit, you will be able to appreciate:

- the challenges which are thrown up by the advances in the ICT and BT before the global IP regime;
- the issues of ethics and equity that have surfaced with the commercial exploitation of cultural heritage of indigenous communities and traditional societies; and
- the role of WIPO in resolving these challenges and issues amicably through evolution of consensus at the international level.

## 2.2 ADVANCES IN INFORMATION AND COMMUNICATION TECHNOLOGY– CHALLENGES FOR IP IN DIGITAL ECONOMY

Advances in ICT have radically transformed the way the world lived only a few decades ago. The way we work and do business, access information, study, write and reproduce works, convene conferences, communicate with fellow beings, entertain

ourselves, seek medical advice, pay taxes, order things, in short practically everything about our living has changed due to these advances, particularly the digital transmission systems like the internet, satellite broadcasting, cable television etc. We are truly living in a digital economy.

Digital economy has posed several challenges for the IPR. The first one arises in copying: the technology has made copying extremely easy and simple; copies can be made fast and in very large numbers at small cost practically by anybody anywhere; each copy is almost as good as the original and can itself be an independent source of high-fidelity copies. Similarly dissemination of information through internet can be extremely fast – information sent by one individual to a group of persons, can be forwarded again by each recipient with the same ease and the numbers of the recipient can explode exponentially. Enforcing IP law against copying becomes extremely difficult under these circumstances. This is to be seen in the context of the general perception that copying an IP work, which is the subject matter of the copyright, for personal/private use is 'fair use'. In a printed work, the compensation the author gets is in proportion to the number of the copies sold. In the case of a digitally disseminated work, this course has no application. Here one has to think of digital means to control access to, or permit copying of the work.

The problem of piracy becomes still graver with multiple-user computer systems, where a pirated digital work loaded on to the system can be used by several persons, all at the same time.

A difficult challenge is posed by the ease of manipulation of a digital work, which is popularly referred to as 'mixing' in India. Such mixing may result in products which may be termed as new and marketed as such. Re-engineering computer programmes can transform them. The copyright protection that gives the original author a right in the derivative work is not so easy to enforce in such cases. It calls for a new set of regulations that can be enforced.

Copyright as it exists today extends over several categories of works: literary, dramatic, musical, painting, photographs, audio-visual recordings, broadcasts, performances, etc. The digital technology makes it possible to combine several attributes in a single work – text, images, sound. It is quite possible that a work will result, sooner rather than later, that will not fall under any of the existing categories.

The protection of IPRs over digital products is clearly a new challenge and it is receiving due attention globally. Two approaches to meet the challenges are: control of access and metering usage. Protection of integrity of the work is an area of concern.

### 2.2.1 Electronic Commerce

There is no precise definition of electronic commerce. Broadly it is understood to mean commercial activity conducted across electronic media, mainly through internet, which is a global information system based on a global infrastructure of computer and telecommunication technologies. A whole lot of commercial activities e.g. advertising, buying, selling, money and other transactions are conducted over the internet for our purpose. We will include all commercial and financial transactions under the term electronic commerce, or e-commerce. E-commerce leads to greater economic efficiency and profitability as also to improved competitiveness. It accelerates the evolution of information society. The emergence of information super highways and national information infrastructures are pointers in that direction.

A major challenge to the IPR system from the wide use of internet arises from the fact that while IPRs are territorial in nature, internet use knows no national boundaries. Digital data transmission cuts across borders, information moves globally and is accessible from anywhere in the world. Information placed on the internet can be

simultaneously accessed by indefinite number of people from all over the globe. It calls for a new globally acceptable IPR regulatory regime.

### 2.2.2 WIPO's Role

As the Internet continues its remarkable expansion, its capacity to disseminate information, knowledge and content has thrust the intellectual property system to the center of the debate over the future shape of the online world. In this new and rapidly changing environment, information and knowledge are increasingly the source of value; hence the intellectual property system – the body of law protecting creations of the mind – is crucial in maintaining a stable and equitable foundation for the development of the digital society.

While the intellectual property system will play a critical role in shaping the digital world, the Internet will have a profound effect on the system itself. The long-term influences are as yet unclear. What is immediately apparent, however, is that this new medium presents a host of complex opportunities and challenges for the intellectual property community.

As the international intellectual property organization, WIPO has launched a far-reaching program of activities - the WIPO Digital Agenda - which reflect and respond to the influence of the Internet and digital technologies on the intellectual property system, and vice-versa, in the coming years. The Organization is committed to formulating appropriate responses aimed at encouraging the dissemination and exploitation of creative works and knowledge on the Internet, as well as at protecting the rights of their creators. In the constantly evolving digital environment, this is a truly unique challenge.

Issues that are covered by the Digital Agenda (see below) include the challenge of the digital divide, the application of intellectual property law in transactions via the Internet, the impact of the Internet and digital technologies on the areas of copyright and related rights, trademarks and domain names, and patents, as well as dispute resolution.

The WIPO Digital Agenda was launched in September 1999 by the Director General of WIPO at the WIPO International Conference on Electronic Commerce and Intellectual Property. It was approved later that month by WIPO's Member States at their General Assembly.

To keep the public fully informed about its activities under the Digital Agenda, WIPO has created a website dedicated to electronic commerce issues. This web site, maintained in English, French and Spanish, provides extensive information regarding WIPO programs in the areas concerned, background papers on substantive issues, and a comprehensive calendar for meetings. The web site can be found at http://ecommerce.wipo.int/. Information updates regarding WIPO electronic commerce program activities and meetings will also be sent by e-mail to interested parties on a quarterly basis. Persons wishing to receive such information updates can register for this purpose at http://ecommerce.wipo.int/information/updates/index.html.

**The WIPO Digital Agenda**

1. Broaden the participation of developing countries through the use of WIPONET and other means for

    - access to IP information
    - participation in global policy formulation
    - opportunities to use their IP assets in ecommerce.

2. Promote adjustment of the international legislative framework to facilitate ecommerce through

   - the extension of the principles of the WIPO Performances and Phonograms Treaty (WPPT) to audiovisual performances
   - the adaptation of broadcasters' rights to the digital era
   - progress towards a possible international instrument on the protection of databases.

3. Implement the recommendations of the Report of the WIPO Domain Name Process and pursue compatibility between identifiers in the real and virtual worlds by establishing rules for mutual respect and eliminating contradictions between the domain name system and the intellectual property system.

4. The interoperability and interconnection of electronic copyright management Develop appropriate principles with the aim of establishing, at the appropriate time at the international level, rules for determining the circumstances of intellectual property liability of Online Service Providers, compatible within a framework of general liability rules for OSPs.

5. Promote adjustment of the institutional framework for facilitating the exploitation of intellectual property in the public interest in a global economy and on a global medium through administrative coordination and, where desired by users, the implementation of practical systems in respect of

   - systems and their metadata (i.e., the information about the copyrighted material stored in these systems)
   - the online licensing of the digital expression of cultural heritage
   - the online administration of IP disputes.

6. Introduce and develop online procedures for the filing and administration of international applications for the PCT, the Madrid System and the Hague Agreement at the earliest possible date.

7. Study and, where appropriate, respond in a timely and effective manner to the need for practical measures designed to improve the management of cultural and other digital assets at the international level by, for example, investigating the desirability and efficacy of

   - model procedures and forms for global licensing of digital assets
   - the notarization of electronic documents
   - the introduction of a procedure for the certification of websites for compliance with appropriate intellectual property standards and procedures.

8. Study any other emerging intellectual property issues related to electronic commerce and, where appropriate, develop norms in relation to such issues.

9. Coordinate with other international organizations in the formulation of appropriate international positions on horizontal issues affecting IP, in particular

   - the validity of electronic contracts
   - jurisdiction.

### 2.2.3 Internet Domain Names Disputes

*What is a domain name?*

A domain name is the address of a web site that is intended to be easily identifiable and easy to remember, such as *yahoo.com*, or *wipo.int*. These user-friendly addresses

for websites help connect computers - and people - on the Internet. Because they are easy to remember and use, domain names have become business identifiers and, increasingly, even trademarks themselves, such as *amazon.com*. By using existing trademarks for domain names - *sony.com,* for example - businesses attract potential customers to their websites.

*What is the nature of the disputes?*

Domain name disputes arise largely from the practice of *cybersquatting*, which involves the pre-emptive registration of trademarks by third parties as domain names.

Cybersquatters exploit the first-come, first-served nature of the domain name registration system to register names of trademarks, famous people or businesses with which they have no connection. Since registration of domain names is relatively simple and inexpensive – less than US$100 in most cases – cybersquatters often register hundreds of such names as domain names.

As the holders of these registrations, cybersquatters often then put the domain names up for auction, or offer them for sale directly to the company or person involved, at prices far beyond the cost of registration. Alternatively, they often keep the registration and use the good name of the person or business associated with that domain name to attract business for their own sites.

*Why so many disputes?*

There is no agreement within the Internet community that would allow organizations that register domain names to pre-screen the filing of potentially problematic names. The reasons vary, ranging from allowing easy registrations to stimulate business, to the practical difficulties involved in determining who holds the rights to a name, to the principle of freedom of expression. Furthermore, the increasing business value of domain names on the Internet has led to more cybersquatting, which results in more disputes and litigation between the cybersquatters and the businesses or individuals whose names have been registered in bad faith.

*How did WIPO get involved in the resolution of disputes?*

The Internet grew rapidly over the last decade as a place to do business, although no international legal standards existed to resolve domain name disputes. The Internet Corporation for Assigned Names and Numbers (ICANN), the organization responsible for, among other things, management of the generic top level domains such as .com, .net and .org, was in urgent need of a solution to the dispute resolution problem. The process of negotiating a new international treaty was considered too slow, and new national laws would most likely be too diverse. What was needed were internationally uniform and mandatory procedures to deal with what are frequently cross-border disputes.

With the support of its member States, WIPO – which is mandated to promote the protection of intellectual property worldwide – conducted extensive consultations with members of the Internet community around the world, after which it prepared and published a report containing recommendations dealing with domain name issues. Based on the report's recommendations, ICANN adopted the Uniform Domain Name Dispute Resolution Policy (UDRP). The UDRP went into effect on December 1, 1999, for all ICANN-accredited registrars of Internet domain names.

Under the UDRP, WIPO is the leading ICANN-accredited domain name dispute resolution service providers. Additionally, a growing number of registrars of country code top-level domains have designated WIPO as a dispute resolution service provider.

*How does the UDRP work?*

The UDRP permits complainants to file a case with a resolution service provider, specifying:

- the domain name in question,
- the respondent or holder of the domain name,
- the registrar with whom the domain name was registered,
- the grounds for the complaint.

Such grounds include, as their central criteria, the way in which the domain name is identical or similar to a trademark to which the complainant has rights; why the respondent should be considered as having no rights or legitimate interests in respect of the domain name that is the subject of the complaint; and why the domain name should be considered as having been registered and used in bad faith.

*Who makes the decisions and how does WIPO ensure that there is no conflict of interest?*

Taking into account the specific circumstances of each dispute, such as the nationality of the parties, WIPO appoints an expert "neutral", or a panelist (from a roster of some 200 independent individuals qualified for deciding such cases) to review the dispute and issue a decision. Either party to the dispute may opt to have one or three panelists assigned to the case.

Panelists must confirm to WIPO the absence of any potential conflict of interest before taking a case, as well as disclose in a written statement any and all facts that should be considered prior to appointment. In the event that one of the parties involved in a case raises a specific objection to a panelist, WIPO will consider offering a replacement.

*What factors guide the panelists' decisions?*

- Whether the domain name is *identical* or *confusingly similar* to a trademark or service mark in which the complainant has rights.
- Whether the respondent has any *rights* or *legitimate interests* in the domain name (for example, the legitimate offering of goods and services under the same name).
- Whether the domain name was registered and is being used in *bad faith***.**

*What accounts for WIPO's popularity as a resolution service provider?*

WIPO's resolution service offers highly qualified neutral panelists, thorough and expeditious administrative procedures, and overall impartiality and credibility.

Dispute resolution at WIPO is much faster than normal litigation in the courts. A domain name case filed with WIPO is normally concluded within two months, using on-line procedures, whereas litigation can take much longer.

Fees are also much lower than normal litigation. There are no in-person hearings, except in extraordinary cases. Minimal filing requirements also help reduce costs. For resolution of a case involving one to five domain names, with a single panelist, the cost is US$ 1,500; for three panelists, the total cost is US$ 3,000. For six to ten domain names, the cost is US$ 2,000 for a single panelist and US$ 4,000 for three panelists.

*What are the resolutions offered by WIPO, and are they binding?*

A domain name is either **cancelled, transferred**, or **sustained** (i.e., the complaint is denied and the respondent keeps the domain name). Some examples of cases that

received significant media attention include ***juliaroberts.com*** and ***jimihendrix.com***, which were transferred to the individuals or their families. A complaint involving ***sting.com***, filed by the singer known as Sting, was denied for a variety of reasons, principally that the domain name registrant was also known by the same nickname, as well as the fact that the name is a common word in the English language and is not necessarily an exclusive trademark.

There are no monetary damages applied in UDRP domain name disputes, and no injunctive relief is available. The accredited domain name registrars - which have agreed to abide by the UDRP - implement a decision after a period of ten days, unless the decision is appealed in that time.

The resolutions offered by WIPO are mandatory in the sense that accredited registrars are bound to take the necessary steps to enforce a decision, such as transferring the name concerned. However, under the UDRP, either party retains the option to take the dispute to a court of competent jurisdiction for independent resolution.

*Will UDRP dispute resolution stifle the Internet?*

On the contrary, domain name registration procedures remain flexible and open to everyone. In fact, the number of disputes represent a mere fraction of the more than 33 million domain names in use on the Internet today. The number of cases filed in 2000 was 1850; it has been progressively coming down every year since then, and in 2003 it was 1053. With the success and reputation of WIPO's dispute resolution services, awareness is increasing among Internet users that abusive practices regarding domain names will no longer go uncontested, and that a quick and simple recourse exists. This helps assure a general reliability of domain names on the Internet.

*What is WIPO doing to further improve the reliability of domain names?*

The UDRP was originally designed for settling disputes in generic top-level domains such as .com, .net, and .org. However, some country code domain name registrars also have started to adopt the UDRP or similar policies, and WIPO has begun providing dispute resolution services for country code top-level domains - for example, .VE for Venezuela and .TV for Tuvalu - further increasing reliability among domain names on the Internet.

WIPO is now addressing the question of protection for identifiers other than trademarks, such as geographical indications - for wine-producing regions, for example – personal names (considering protection other than as a recognized trademark, for which they may already qualify under the UDRP), trade names, and names or acronyms of international intergovernmental organizations.

Developments in the field of domain names and related dispute resolution are extremely dynamic. Continuously updated information on this subject is available on the Internet at http://arbiter.wipo.int/domains, as well as at http://ecommerce.wipo.int/domains.

**SAQ 1**

*Spend 3 min.*

Mark the following statements as True (T) or False (F):

- Protection of integrity of copyrighted works is easy with all the advances in digital technology
- Cybersquatting is at the root of internet domain name disputes
- The number of domain name disputes compared to the total number of addresses on the web is very small.

## 2.3 BIOTECHNOLOGY AND IP

Biotechnology utilises biological processes; its techniques use living organisms or parts of them and naturally occurring proteins and enzymes, or these compounds derived from living systems.

The economic potential of biotechnological processes and products is recognised to be vast. The scope of inventions and innovation in biotechnology is limitless. And the demand for venture capital for establishing biotech-based industry is huge. In view of these characteristics biotechnology presents a hot area for intellectual property. However, the field bristles with sensitive, ethical and moral issues which generate heated controversy.

The difficulties partly arise because the existing intellectual property system has been basically designed for inanimate objects. Living objects, natural or engineered have not been traditionally regarded as subject matter of intellectual property. But the fact that they represent a literal gold mine for products and processes to meet a number of human wants and serve science and society is compelling a re-examination of views and issues, and the situation of living systems and technology based on them is undergoing transformation. Micro organisms were widely used in pharmaceutical research by 1980 and many industrialised countries brought them under patent cover. Culture of tissues and cells from plants and animals including man soon followed. However, this trade gave rise to debates around several issues: ethical issues in biotech inventions which generally used techniques like recombinant DNA, cell fusion, manipulation of embryos; rights of researchers and communities; farmers privilege, sharing of genetic material, distinction between 'discovery' and invention, etc.

A point of difficulty arises because IPR is granted in lieu of an adequate description of invention, subject to other criteria, but as a biological invention involves a living substance it may not be possible to do so. Also, the invention can not be reproduced if the biological material is not available. This led to a system of international repositories where all biological materials are to be deposited by inventors as required under the Budapest Treaty on the International Recognition of the Deposit of Micro organisms for the Purposes of Patent Procedure. However, each member-State, party to the Treaty has to legislate such provision into its national law.

The 'discovery vs. invention' debate acquires extra edge in the case of biological invention. Logically, if man notices a biological substance that already existed in nature and observes its properties, for the first time ever, he is on to a discovery, not an invention. These are products of nature, not human inventions. Similarly, all natural biological processes of reproduction in animals and plants are not inventions to be patented. The question of patent will arise if there is human intervention that leads to some thing that fulfils criteria of patentability. However, things do not seem to be so simple and straight and the most developed block of nations (the USA, the European Union, Japan) seems to be concluding that naturally occurring substances including micro organisms would qualify for patents if they 'are isolated for the first time in a form or purity that did not occur in nature', have been identified distinctly and have industrial application.

A European Commission (EC) Directive gives a list of biological inventions which should be regarded as non-patentable on grounds of public order and morality. It includes:

- processes for cloning human beings;
- processes for modifying the germ line genetic identity of human beings;
- use of human embryo for industrial or commercial purposes; and

- processes for modifying the genetic identity of animals which are likely to cause them suffering without any substantial benefit to man or animal, and also animals resulting from such process.

The TRIPS Agreement does not define 'micro organism' but makes it obligatory to provide patent protection for 'micro organisms' and 'microbiological processes'. Thus a State has some flexibility in deciding what can be protected under 'micro organisms'. The TRIPS requires plant varieties to be protected by patents or by a *sui generis* system or by a combination of both, but countries could exclude plants from patenting.

### 2.3.1 Human Genome

The draft of the genetic master blue print of a human being is ready; preliminary sequence maps of the human genome have been made. The questions pertinent to intellectual property are: Who owns the data? Are genes or parts of genes patentable? If so, under what conditions? Is the donor of human genetic issue relevant from the IP point of view, if its study leads to a patentable product? This last question is particularly important because it involves the questions of informed consent and benefit sharing. While patent is not concerned with the donor consent and developed countries pay scant regard to consent and benefit sharing, the developing countries regard them as key issues in any collaboration for research, using indigenous genetic material.

There is substantial opinion against patenting of genes: it is feared that once genes become private property, full benefits of genome decoding will not be available; the counterpoint advanced by drug developing companies is that without patent rights, it would not be possible to fund research into new drug development.

The main arguments against patenting of genes are: (i) genes being natural entities can not be owned by any body; (ii) genes being discoveries have no element of novelty or inventiveness and thus do not qualify as invention; (iii) the processes for isolation and cloning of genes are well known.

In most developed countries human gene sequences are patentable as part of genomic invention. There could be multiple patents on different parts of the same gene sequence. It makes further examination of and research into gene sequence very costly as licences will have to be obtained from the several owners of different patents concerned with the work, and costs for searching different patents will have to be paid.

There is a rush from companies, having large databases of ESTs to patent these ESTs in the hope that usefulness of these fragments will be found at some future date. There is strong opinion against patenting such gene fragments because it is early stage of genome research and the applicants know little about the functions and uses of genes and have not even characterised them.

## 2.4 TRADITIONAL KNOWLEDGE, FOLK LORE, BIODIVERSITY AND IP

Traditional Knowledge (TK) refers to the total stock of knowledge and practices developed and used by a community over centuries to meet different life situations. It will include traditional medicine and healing practices, folk lore and folk art, ethnic and ethnographic products. TK is the outcome of an indigenous community's observations and experiences, and expressions of its creative urges in various forms through the long march of history. The Indian systems of medicine like Ayurveda and Siddha are recognised to be very well developed and intensely knowledge based. Besides them folk medicines and psychotherapeutic healing practices call for attention. India has rich traditions of folk art and craft, folk music, folk dance and

folk drama. This is largely true of all indigenous communities of the world. They have fabulous knowledge of natural resources around them – herbs and plants, animals including insects, reptiles and birds, minerals, water resources. Above all they have developed ways to live in harmony with nature in an eminently sustainable way, preserving and enhancing the biodiversity and endeavouring to give back to the nature what one is obliged to take away from it.

TK is an omnibus term that would cover knowledge of a community about science technology, agriculture, medicine, biodiversity, folk art, craft, dance, drama, music, designs and motifs, symbols, stories and movable cultural properties.

Products based on traditional knowledge and indigenous resources through the application of modern science and technology have generated mega businesses. The folk art in its many forms stands transformed into a big cultural industry. This transformation of the TK into big commerce brings in its wake the issues of intellectual property.

It may be pointed out that the TK and the folklore on the one hand, and the IP system on the other, have very different sources of inspiration and motivation, and cultural attitudes. TK has sustained communities providing them with sources of income, items of food and other necessities of life as also effective health care in a very sustainable way. Exploitation of nature for personal greed is largely unknown in indigenous communities. There is emphasis on community as the owner of natural resources, rather than the individual. The value system of IP springs from the concept of private ownership of one's intellectual creation, and exclusion of others from sharing the fruits of ones intellectual labour. The two divergent approaches need to be reconciled in the interest of both equity and scientific progress.

The traditional knowledge does not have always to be old; in fact, it could be contemporary. TK is the knowledge that traditional communities have been developing to face and solve the problems of life as they face. As the social environment gradually but surely changes, the newer generations have to cope with the change and add to the total stock of knowledge. The new contribution becomes an integral part of the TK. The critical thing is that the creation, verification and adoption of new knowledge takes place according to the norms and practices of the traditional system.

**WIPO Work on Traditional Knowledge**

More recently, international intellectual property policy debate has broadened its focus to consider the related issue of traditional knowledge (TK), and particularly how traditional knowledge may be protected through the intellectual property system.

Increasingly, traditional knowledge is considered as the content, substance or idea of knowledge (such as traditional know-how about the medicinal use of a plant, or traditional ecological management practices), as distinct from the form, expression or representation of traditional cultures (such as a traditional song, performance, oral narrative or graphic design), which are known as TCEs or expressions of folklore. This section reviews the current debate about traditional knowledge protection, which is at a more exploratory stage but is nonetheless an area of high policy priority for many countries, and is under active consideration within WIPO as well as several other international organizations.

Holders of Traditional Knowledge, such as indigenous and local communities, have stressed that there is a holistic relationship between their traditional knowledge, the genetic resources (such as plants) which form part of their environment, and the TCEs or expressions of folklore that reflect their cultural identity. The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC) was established in 2001 to address these issues in a comprehensive way, and has therefore considered the protection of

both traditional knowledge and TCEs, together with intellectual property aspects of genetic resources.

The call for protection of traditional knowledge through the intellectual property system raises challenging questions:

- What is traditional knowledge?
- Can the astonishing diversity of indigenous and local intellectual and spiritual traditions be bundled together into one single definition, without losing the diversity that is their lifeblood?
- What is meant by "protection"? What is to be protected, and what is it to be protected from, for what purpose, and for whose benefit? If there are to be rights in traditional knowledge, who should own the rights, and how should they be enforced?

In addressing these issues, the IGC's work on traditional knowledge protection has also highlighted deeper concerns. For instance, there are concerns that attempts to protect traditional knowledge within the intellectual property system could turn traditional knowledge into an asset sought by third parties, thereby separating it from the very communities that create and nurture it, and consequently depriving them of vital benefits. So communities have maintained that any protection of traditional knowledge should remain true to its spiritual, scientific and legal roots. For many communities, the ancestral customary laws and practices that determine how knowledge should be protected are integral to the knowledge itself: traditional law and knowledge form an indivisible whole. Should these roots – the community life, the traditional practices and beliefs that are integral to traditional knowledge – be protected just as much as the intellectual and cultural fruits they have yielded?

**Traditional Knowledge and the Intellectual Property System**

This means that the search for traditional knowledge protection can amount to a fundamental reassessment of the basic principles and assumptions of the intellectual property system, and a complex debate about how traditional knowledge relates to the formal concepts and structures of the modern intellectual property systems. Some argue that intellectual property facilitates the assertion of illegitimate property rights over material derived from traditional knowledge. But practice has shown how intellectual property systems can strengthen the authority of the holders of traditional knowledge and associated genetic resources, and can help to define and structure how their intangible assets are used and the benefits equitably shared.

Much depends on opening up more practical options to indigenous and local communities, and enhancing their capacity for benefiting from their options. This poses the crucial question: What is the immediate need? Is it to create new forms of legal protection for traditional knowledge, to strengthen communities' capacity for making use of existing mechanisms or to build coordinated links between development and adaptation of legal systems and practical capacity-building?

**Traditional Knowledge and the Global Marketplace**

The debate about traditional knowledge protection has come to a head because of the increased perceived value of traditional knowledge in the global marketplace. Traditional knowledge and associated genetic resources have been drawn on to create new products, pharmaceuticals and agricultural products. In addition, the cultural, spiritual and technological dimensions of many traditional knowledge systems have survived, often adapting to the challenges of contact and interaction with modern technological society: traditional knowledge remains part of the life of many living communities, and should not be relegated to the archives as a historical curiosity. Certainly, traditional knowledge is a new concept in international intellectual property.

WIPO initiated work on traditional knowledge in 1998, and the Convention on Biological Diversity, a landmark in the recognition of traditional knowledge in international law, was concluded in 1992.

Yet traditional knowledge constitutes some of humankind's oldest intellectual traditions and systems of knowledge and belief. Technical know-how, TCEs and the natural environment interact and interplay in a complex manner, finding expression in customary practices, community laws and ethical standards. For some traditional communities, customary law creates a vital link between access to and custodianship of traditional knowledge, and a sense of responsibility to respect, preserve and use it appropriately. These forms of knowledge, law and custodianship long predate the emergence of modern intellectual property law. So one concern is to respect and safeguard these traditional legal concepts and traditional knowledge management systems. Traditional wisdom has also been vital for the conservation of the natural environment, and is an essential source of information about the preservation and sustainable use of biological resources. It is therefore no coincidence that the first recognition of traditional knowledge as such in an international legal setting was in relation to the conservation of biological diversity.

**Challenges for the Future**

Future development of traditional knowledge protection therefore confronts a number of seeming paradoxes:

- this is a strikingly new area of international cooperation in intellectual property, but it concerns knowledge and systems of knowledge that have deep and ancient roots;
- it is an international issue, marked by a search for global solutions, but it concerns traditional knowledge systems that are highly diverse and are inherently embedded in local customary law and the natural environment;
- traditional knowledge and the formal legal means of protecting it are seen as
- different things (just as an invention and the patent which protects it are distinct concepts), but for indigenous communities, having traditional knowledge and also having the responsibility for safeguarding it and using it according to customary law form an indivisible whole.

International progress on traditional knowledge protection is currently at a crossroads. The debate has already yielded a much clearer shared understanding of the basic ideas and concepts for traditional knowledge protection, and a more focused understanding of what the policy choices are. Several specific initiatives have already enhanced the practical recognition of traditional knowledge within the patent system, so that traditional knowledge is less likely to be the subject matter of ill-founded patent claims. The possibilities for protecting traditional knowledge through existing legal tools, including the law of confidential information (traditional knowledge as undisclosed technical know-how), geographical indications (some products are literal embodiments of geographically-localized traditional knowledge) and patent law (over 20,000 patent applications have been filed in China for innovations in the field of traditional Chinese medicine).

In addition, several countries have introduced *sui generis* protection of traditional knowledge, and this practical experience is helping to guide understanding of what further legal steps are needed to prevent the misappropriation and misuse of traditional knowledge.

The use of existing and new intellectual property approaches alone will not resolve the challenges confronting traditional communities today, who will need to draw on a range of legal and practical tools to strengthen respect for the customary laws that protect their traditional knowledge. Yet there are grounds for optimism that judicious use of the intellectual property system can be a useful support for these communities, and can contribute to their cultural and economic well-being and autonomy. Practical

experience, in turn, should lead to greater understanding of what new legal measures are needed, at the national and international levels.

### 2.4.1 Biodiversity

Biodiversity refers to the variety of life-forms (living organisms) found in different eco-systems on land and water. Developing countries are vastly rich in biodiversity, both in the plant and the animal kingdoms. These varieties together with TK become hugely beneficial for scientific research and development of pharmaceutical and cosmetic products, besides other products which make mega business. Access to biodiversity and TK is therefore highly coveted. However, since modern scientific research and product development are beyond the resources, both in terms of knowledge of modern science and technology, and finance, the exploitation of biodiversity and TK by companies and entrepreneurs of developed countries has often resulted in no benefit to the indigenous communities to which they belonged. This is seen as inequitous and unjustified. Efforts are on to ensure that the donors of the genetic material and the TK receive due recognition and a due share in profits.

Such conflict of interest is particularly keen because indigenous herbs and plants are extensively used in traditional systems of medicine. Besides medicines and healthcare products, plants are widely used for food and beauty products which are huge industries themselves. The issue of conflicting interests between the makers of the products and the communities from whom the plants and the TK are taken becomes more difficult because accessing plant material directly from the communities is not always necessary. Once a plant has been taken out, lawfully or otherwise, modern science has made it easy to propagate it through techniques like tissue culture, cell culture or transgenic technology.

The inevitable intrusion of the global IP system into the domain of the traditional knowledge has thrown up two very different, conflicting views that need to be resolved. One view strongly argues for the extension of the IP system to cover TK as it would give a boost to innovation and bring the TK into the main economic space. The contending view holds that this way the TK, which is the property of the community, is appropriated by a few and exploited for their commercial benefit. To reconcile these antagonistic views the developed countries could ensure that the traditional communities get an equitable share from the commercial benefits that are made possible due to the use of their genetic resources and TK.

**SAQ 2**

Mark the following statements as True (T) or False (F):

Traditional Knowledge

- is the ancient Knowledge available with local communities T/F
- is the knowledge created by local communities to deal with the challenges of their social and physical environment T/F
- can be contemporary knowledge developed and maintained in its local context. T/F

**The Role of WIPO**

WIPO is expected by its Member States to be present at international discussions relating to genetic resources, traditional knowledge and folklore, to help clarify as far as possible the implications for intellectual property. This involves identifying and addressing the relevant intellectual property issues. WIPO is also expected to engage in work and facilitate discussions with a view to bringing about progress in the consideration of the issues.

In this context, a WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore was established in September 2000 by WIPO Member States. The primary themes that it would address in the course of its work include the intellectual property questions raised by:

- access to genetic resources and benefit-sharing;
- protection of traditional knowledge, whether or not associated with those resources;
- protection of expressions of folklore.

Besides WIPO's Member States, the many Non-Governmental Organizations (NGOs) that have observer status in dealings with WIPO will be invited to meetings of the Intergovernmental Committee. Other NGOs may be interested on a case-by-case basis.

Before the creation of the Intergovernmental Committee, WIPO had already held various meetings and carried out various activities on the subject. These included the drafting of a questionnaire to gather information on the protection of biotechnological inventions in the member States of WIPO, including certain aspects regarding intellectual property and genetic resources, as well as a study on the Role of Intellectual Property Rights in the Sharing of Benefits Arising from the Use of Biological Resources and Associated Traditional Knowledge. This project was implemented in close collaboration with the United Nations Environment Program.

WIPO carried out nine fact-finding missions to the South Pacific, South Asia, Southern and Eastern Africa, North America, West Africa, Arab countries, South America, Central America and the Caribbean. Those missions identified and explored the intellectual property needs and expectations of holders of traditional knowledge, in order to strengthen the role of the intellectual property system in their cultural, social and economic development. The missions also provided an opportunity for stake-holders and practitioners in communities to consider present or future solutions to ensure that the intellectual property rights of the holders of traditional knowledge, innovations and culture are protected.

A Working Group on Biotechnology met in November 1999 which adopted a set of projects on intellectual property and the legal protection of biotechnological inventions. Two global roundtables were held to discuss the relationship between intellectual property and traditional knowledge, namely a Roundtable on Intellectual Property and Indigenous Peoples in July 1998 and a Roundtable on Intellectual Property and Traditional Knowledge in November 1999.

Four Regional Consultations on the Protection of Expressions of Folklore took place in 1999, for Africa, for Asia and the Pacific, for the Arab countries and for Latin America and the Caribbean. Each meeting adopted proposals for the continuation of the work undertaken. Finally, an interregional Meeting on Intellectual Property and Genetic Resources was held at WIPO in April 2000, which in particular took stock of the work being undertaken within WIPO on those subjects.

It is important to protect and promote TK. Protection would mean two things: (a) to protect TK from unauthorised use by third parties; (b) to prohibit use that may erode it, and adversely impact the life or living of the community. Promotion of TK would require a multi-pronged approach. This would seek to encourage innovation based on TK and emphasise commercialisation of elements of TK that are amenable to it, ensuring equitable sharing of benefits. Enlisting participation of indigenous communities, a sustainable use of natural resources has to be ensured. The access to TK for various purposes has to be closely monitored to ensure demands for growth and equity.

## 2.5 SUMMARY

- Advances in ICT have changed the way people live, work and conduct business. Reproduction with high fidelity, in very large numbers, has become easy and cheap. It can be done anywhere and transmitted from any where to anywhere on the globe across national boundaries. Enforcing IPR under these circumstances is difficult.
- Multiple user computer systems enable pirated digital works to be used by several persons simultaneously.
- Manipulation of digital works is easy, leading the resulting work to be claimed as new and original.
- Protection of IP over digital products is following two approaches: control of access; metering usage. Protecting integrity of work is an area of concern.
- WIPO through its Digital Agenda is helping in crystallising all issues and evolving their solutions through international consensus.
- A domain name is the address of a website. Disputes arise due to cybersquatting. WIPO is the leading ICANN accredited agency for resolution of domain name disputes.
- Biotechnological processes and products have vast economic potential, and thus they are hot items of IP. It is full of ethical questions and moral debates.
- Access to rich biodiversity and traditional knowledge of developing nations for developing biotechnological processes and products raises questions of ownership and benefit sharing.
- Extension of IP to living things is recent. It raises question of discovery vs invention besides the propriety of appropriating natural living organisms as private property.
- The USPTO does not grant patent on a fundamental gene, ESTs or SNPs, unless they have a role in human health and a commercial potential.
- Traditional Knowledge covers knowledge of a community to deal with all life situations i.e. its science and technology, agriculture, medicine, biodiversity, folk art and craft, folk music and dance, drama, folk motifs, designs and symbols, in fact all moveable cultural material.
- TK and the folk lore, on the one hand, and the IP system on the other, are products of two very different cultural and value systems, one regarding knowledge and folklore as belonging to the community, the other seeing creations of ones own mind and skills as belonging to the individual, as personal property. A reconciliation of the two views is engaging serious attention at the international level with WIPO playing a lead role.

## 2.6 TERMINAL QUESTIONS

*Spend* 15 *min.*

1. What is a Domain Name? How do domain name disputes arise? What role does WIPO play in the resolution of domain name disputes?
2. Discuss the issues thrown up before the IP regime due to the emergence of biotechnology as an area seeing rapid scientific and technological development.
3. What are the issues involved in the commercialisation of technology based on exploitation of traditional knowledge, folk lore, and biodiversity, within the

prevailing global IP regime. Define each of these three terms, namely, traditional knowledge, folk lore, and biodiversity.

## 2.7 ANSWERS AND HINTS

**Self Assessment Questions**

1. F; T; T
2. F; T; T

**Terminal Questions**

1. Refer 2.2.2.
2. Refer 2.3.
3. Refer 2.4.

# UNIT 3 INTELLECTUAL PROPERTY RIGHTS – THE INDIAN SCENARIO

**Structure**


3.1 Introduction
Objectives
3.2 History of IP Legislation
3.3 Overview of IP Law in India
The Indian Patent Law
3.4 IP Acts Enacted by India
3.5 Major International Treaties Signed by India
3.6 Summary
3.7 Terminal Questions
3.8 Answers and Hints


## 3.1 INTRODUCTION

The tradition of scholarship and intellectual creativity in India goes back to a few millennia. Yet the concept of Intellectual Property Rights in the modern sense is rather new and would appear to have no cultural moorings or sanction in our country. The history of intellectual property rights in India backed by enforceable legal provisions scarcely goes back to 150 years.

**Objectives**

After studying this unit you will:

- know the history of IP legislation in India;
- have an overview of the IP Law in India;
- know IP Laws enacted by India; and
- know International IP Treaties where India is a member.

## 3.2 HISTORY OF IP LEGISLATION

**Patents**

The first Indian statute on patents was passed in 1856 granting some exclusive rights to inventors for 14 years. It had to be re-enacted with some modification as the Act of 1859. It granted to inventors of 'new manufacture' exclusive rights to make, sell and use the invention in India, or to authorise some one to do so. Its scope was expanded to include designs, under 'the new manufacture' in the Patents and Designs Protection Act 1872. Then came the Inventions and Designs Act of 1888, and later the Indian Patents and Designs Act 1911, (which was modelled largely on the British Patents and Designs Act 1907). After independence in 1947, the Government felt the need for a more effective patent legislation. The existing situation with regard to patents was reviewed by two expert committees: one, headed by Justice Rajagopal Iyengar, and another headed by Bakshi Tek Chand. It was revealed that the MNCs, who owned 90% of all patents in India, had misused patents largely to ensure a protected market in India for their products, denying availability of many essential goods to people at competitive prices. The Patents Bill following the reports of these Committees was debated for a decade when finally the Indian Patents Act 1970 was enacted. It was highly acclaimed by, amongst others, UNCTAD, as a most progressive patent law and inspired similar legislation in many developing countries. It clearly codified inventions that could not be patented, permitted patenting of only process, not products, of manufacture in the fields of food, drugs and medicines and substances

produced by chemical processes. The term of patent was in the case of process relating to food, medicines and drug, 5 years from the sealing of the patent or 7 years from the date of patent whichever was earlier; in case of other process patents, it was 14 years; it had provision for 'licences of right' and compulsory licensing in some circumstances; it provided for use of inventions for government purposes, acquisition of invention by Central Government and revocation of patents in public interest.

Following India's membership of the WTO and her obligations under the TRIPS Agreement, the Indian Patents Act 1970, was amended by Patents (Amendment) Act 1999 and Patents (Amendment) Act 2002, which came into force on May 2, 2003. The Provisions of the present Act are in line with the TRIPS Agreement.

**Trademarks**

No specific legislation existed on trademark before 1940. However, remedies for violation of trademark were available under the Indian Penal Code 1860 and Specific Relief Act, 1877. The Trade Marks Act, 1940 was replaced by the Trade and Merchandise Marks Act, 1958, which has now been repealed and replaced by the Trade Marks Act, 1999.

**Designs**

Designs continued to be governed by the provisions of the Indian Patents and Designs Act, 1911, until the Designs Act, 2000 was passed.

**Copyright**

In matters of Copyright the English Copyright Act, 1842 was deemed applicable to India, though it was never expressly declared to be so. The application of the Copyright Act, 1911 of England was extended to India as a British dominion. The Indian Copyright Act, 1914 introduced criminal sanctions for infringement and continued till the copyright act 1957 came into force on 21.1.1958. This was necessitated as much by the changed status of India as an independent nation as by the advancement of technology of reproduction and communication. The Act had several original features; registration of copyright was voluntary; an administrative machinery for registration of copyright was established; the government was empowered to protect copyright of citizens from other countries. It has been amended since then in 1983, 1992, 1994, and 1999 – the last one, after India ratified the TRIPS Agreement as a member of the WTO.

Besides these four principal fields for intellectual property protection, namely, patents, trademarks, industrial designs and copyright, India has enacted the IP laws for geographical indications of goods, protection of plant varieties and farmers' rights, semiconductor IC layout designs, information technology, and biodiversity.

## 3.3 OVERVIEW OF IP LAW IN INDIA

The Indian Law to grant and regulate protection of intellectual property in various fields of IP has now been aligned to the requirements and provisions as visualised under the TRIPS Agreement of the WTO.

You will study the details of the individual Acts dealing with specific IP instruments – patents, copyright, trademarks, industrial designs etc. – in relevant Units. Here we will refer to some general features, specially those pertaining to the administration and enforcement of IPRs in India, that define IP Laws in India.

### 3.3.1 The Indian Patent Law

The law relating to patents is laid down in the Indian Patents Act (1970) as amended by Patents (Amendment) Act, 1999 and Patents (Amendment) Act, 2002. Some of the

more significant changes introduced by these amendments in the original Act of 1970 are as follows:

- There is no restriction now on Indians applying for patents abroad.
- The definition of term 'invention' is fully consistent with the TRIPS Agreement, and includes both products and processes in all fields of technology. Before amendment only methods or processes of manufacture relating to food, medicines and drugs were patentable.
- The list of items that are not to count as inventions for grant of patents has been modified to include exclusions permitted by the TRIPS Agreement. Earlier an invention was not patentable if its primary or intended use would be 'contrary to law or morality or injurious to public health.' Now it will not be considered an invention if its 'primary or intended use or commercial exploitation' could be 'contrary to public order or morality or which causes serious prejudice to human, animal or plant life or health or to the environment. Also 'discovery of any living thing or non-living substance occurring in nature' is not regarded as an invention under the amended Act.
- The rights of the patentee have been brought in line with the provisions of the TRIPS Agreement, as necessitated by changes permitting product patents.
- Reversal of burden of proof when infringement of a process patent occurs has been included in accordance with the TRIPS Agreement. It is now for the defendant to prove that the process being used by him is different from the patented process alleged to be infringed.
- The term of patent is now uniform 20 years as required by the TRIPS. Earlier, for a process patent, relating to an item of food, medicine or drug it was five years from the date of sealing of the patent or seven years from the date of application whichever period was shorter, and fourteen years from the date of patent in respect of any other invention.
- The provision of licenses of right has been omitted and compulsory licensing brought in line with TRIPS.
- Provisions for exclusive marketing rights have been included.
- Provisions for parallel import of patented products have been included.
- Protection of biodiversity and traditional knowledge, under 'inventions not patentable' category.

The Act makes the Controller General of Patents, Designs and Trade marks appointed under the Trade Marks Act, 1999 as the controller of Patents with powers of a civil court.

**Indian Copyright Law**

The Copyright Act, 1957, as amended in 1999 governs the copyright law in India. It came into force on January 15, 2000. It has established a copyright office, under the immediate control of the Registrar of Copyrights, to facilitate registration of copyright. It has also established a Copyright Board (CB) with Registrar of copyrights as its Secretary. The CB is meant to hear and settle certain kinds of disputes arising under the Act.

The Act defines various categories of works in which copyright subsists, and has inter alia, provisions for determination of first ownership of copyright, the scope of rights conferred; assignment and licensing of copyright; compulsory licensing and the circumstances in which it could be granted; performing rights of societies; broadcasting rights; authors special rights; international copyrights. The Act sets out

in detail what constitutes infringement and what does not; civil and criminal remedies against infringement and remedies against threat of legal proceedings without any ground.

The Indian copyright law is in conformity with the provisions of the TRIPS Agreement of the WTO. It is also in line with the provisions of the Berne Convention for the Protection of Literary and Artistic Works (Brussel Text, 1948), and the Universal Copyright Convention (1952); India is a member of both conventions.

**Indian Trade Mark Law**

The Trade Marks Act, 1999 lays down the law governing trade marks in India.

It extends the scope of protection by registration of trade marks to services, besides goods. It provides for a single register and simplifies the procedure for registration. It recognises well known marks as a distinct category, and provides for registration of collective marks, owned by an association of persons. It firmly discourages persons tempted to exploit other persons good name in business through false or misleading means.

The Controller-General of Patents, Designs and Trade Marks is the Registrar of Trade Marks. The act establishes an appellate board with the same powers as are vested in a civil court; any proceedings before the Board are deemed as judicial proceedings.

Several measures have been taken to simplify trade mark law and procedure, offer better protection and make enforcement more effective, e.g. a single application for registration in more than one class; increasing the term of protection from 7 years to 10 years; enhancing punishment to bring it at par with the copyright law; making trade mark offences cognisable.

**Indian Designs Law**

The Designs Act 2000 lays down the law for protection of industrial designs in India. The Controller-General of Patents, Designs and Trade Marks is the Controller of Designs.

The Act inter alia defines ‘original’ and enlarges the scope of definitions of ‘article’ and ‘design’; it spells out what designs shall not be registered, brings in the internationally followed system of classification in place of the Indian system, provides for restoration of lapsed designs and maintaining the register of designs on computer; the two year period of secrecy of a registered design is revoked and any document for transfer of right in a registered design is required to be compulsorily registered. More grounds have been added for cancellation of registration and cancellation proceedings are to be initiated before the Controller of Designs instead of a High Court. Infringement attracts heavier penalties; the initial period of registration is enhanced from 5 years to 10 years, extendable by a further period of 5 years. It provides for control of anti-competitive practices in contractual licences. Appeal against an order of the control lies to the High Court.

**Appeal Mechanism**

In keeping with its status as a major, vibrant economy, and as an active contributor in the realm of knowledge and creativity, India, though a relatively late comer in the IP game, has strong IP Laws and effective enforcement of IPRs. All the Acts dealing with IP in its various forms are aligned to the TRIPS Agreement making appropriate use of flexibilities available under the TRIPS. They are fully alive to the role of IPRs in growth and development consistent with societal and environmental concerns.

All the IP Laws provide for (i) a fully empowered administrative machinery to grant and register claims for IPRs in a fair and transparent manner, (ii) a mechanism for appeal against administrative decisions if necessary, and (iii) a procedure for legal enforcement of IPRs.

Patents and industrial designs are required to be registered under the relevant Acts to claim any legal protection of IPRs. However, copyright and trademarks (in India) have no such requirement. Their registration is voluntary, but in case of legal disputes, registration carries distinct advantages. As copying, counterfeiting and forgery have become easy and rampant and economic consequences of infringing a copyright or using a brand name (trademark) in an unfair way may be huge, it is advisable to get the copyright and trademark duly registered.

The provision of appeal against a decision/order of the highest controlling authority is only fair and necessary under a sound legal system. The appeal earlier used to lie with a High Court of appropriate jurisdiction. However, the domain of IP being highly specialised, which was often unfamiliar to a High Court judge, the need of a specialist member on the reviewing bench was always felt. Further the disposal of an appeal in a High Court was time-consuming and involved high cost of litigation.

Having regard to these considerations, the Trade Marks Act, 1999, established an Appellate Board (AB) having advocates who have been active in the field of Trade Marks for 10 years. A bench of the Appellate Board will consist of a Judicial Member and a Technical Member. The bench will sit at a place decided by the Central Government.

The Appellate Board for trade marks is also the appellate authority under the Patents Act, 1970, as amended by the Patents (Amendment) Act, 2002. It is also the Appellate Board for geographical indications. The Technical Member of the AB for patents cases is a person experienced in patent law to consider appeals against the decision of Controller. He is a person who has been Controller, or has exercised his functions, for 5 years, or he should be an Advocate practising law relating to patents and designs for 10 years. A bench of the Appellate Board consists of one judicial member and one technical member.

The Appellate Board sits in the following cities: Ahmedabad, Chennai, Delhi, Mumbai, Kolkata. The Board fixes its own procedure, place and time of sittings.

Pursuing a case before a trade mark Appellate Board or the Copyright Board (which can also have sittings all over India) can be frustrating and difficult experience.

The procedure for appeal in the case of copyright is different. The appeal against a decision of the Registrar of Copyrights lies with the Copyright Board. The Copyright Board, constituted by the Central Government, consists of a Chairman who is or has been or has the qualifications to be a judge of High Court, and two to fourteen members. The Registrar of Copyrights is the secretary of the Board. A further appeal against the decision of the Copyright Board lies with the High Court of appropriate jurisdiction.

Under the Designs Act, 2000, the appeal against a decision of the Controller of Designs lies with the High Court. The Semiconductor Integrated Circuits Lay-out Designs Act, 2000, provides for a Layout Design Appellate Board, and an appeal against its decision lies with the High Court. The appellate authority under the Protection of Plant Varieties and Farmers' Rights Act 2001, is the Plant Varieties Protection Appellate Tribunal. The Biological Diversity Act 2002 provides for a appeal against the orders of the national biodiversity authority or a state biodiversity board, to the High Court. The Information Technology Act provides for appeal to a cyber Appellate Tribunal against one order of the Controller of Certifying Authority or an adjucating officer.

Thus, the situation in respect of appeal related to various kinds of IPRs may do with some streamlining.

The diversity of appellate authorities and procedures for different IPRs seems unnecessary. There could be a case to have only one Intellectual Property Appellate Tribunal to hear appeals cases of all category of IPRs. The Tribunal and its benches

may also shed the roving character and have fixed places for hearings to make it easy, convenient and less costly for litigants to pursue their cases.

## 3.4 IP ACTS ENACTED BY INDIA

India has enacted the following IP Acts:

1. The Patents Act, 1970, as amended by the Patents (Amendment) Act, 1999, and the Patents (Amendment) Act, 2002
2. The Copyright Act, 1957 as amended in 1999
3. The Trade marks Act, 1999
4. The Designs Act, 2000
5. The Geographical Indications of Goods (Registration and Protection) Act, 1999
6. The Protection of Plant Varieties and Farmers Rights Act, 2001
7. Integrated Circuit Layout Designs Act, 2000
8. The Biological Diversity Act, 2002

**Activity 1**

Find out which of the Acts are already in force.

*Spend 2 min.*

**SAQ 1**

Has India aligned its IP Laws with the requirements of the international IP regime as envisaged under the TRIPS agreement.

## 3.5 MAJOR INTERNATIONAL TREATIES SIGNED BY INDIA

1. The Convention Establishing the World Intellectual Property Organisation
2. The Paris Convention for the Protection of Industrial Property
3. The Berne Convention for the Protection of Literary and Artistic works
4. The Patent Cooperation Treaty
5. The Geneva Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of their Phonograms.
6. The Budapest Treaty on the International Recognition of the Deposit of Micro organisms for the Purposes of Patent Procedure
7. The Universal Convention of Copyrights

## 3.6 SUMMARY

A brief history of IP legislation in India is given. An overview of the current IP Law in four principal kinds of IP viz. patents, copyrights, trade marks and designs, is given pointing to some salient features that make the IP provisions in India tougher and in conformity with its international obligations. Existing Acts giving IP laws in various categories of IP have been listed, as also major international treaties which India has signed.

## 3.7 TERMINAL QUESTIONS

*Spend* 10 *min.*

1. Discuss the major changes effected in the Indian Patent Law (1970) after its amendment by Patents (Amendment Act) 1999, and Patents (Amendment) Act, 2002.

2. Discuss the Appeal Mechanism available in India in relation to IPRs.

## 3.8 ANSWERS AND HINTS

**Self Assessment Questions**

1. Yes

**Terminal Questions**

1. Refer 3.3
2. Refer 3.3